No. 03-56259
Filed November 23, 2005
Before: Harry Pregerson and William C. Canby, Jr., Circuit Judges,
and Edward C. Reed, Jr., District Judge

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SANDRA PADILLA, et al.,

Plaintiffs-Appellants,

v.

ROSALYN LEVER, et al.,

Defendants-Appellees,

and

VIVIAN MARTINEZ,

Defendant-Appellee.

On Appeal From the United States District Court
for the Central District of California

PETITION FOR REHEARING EN BANC

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I.

INTRODUCTION AND STATEMENT OF COUNSEL

Appellees-Defendants ROSALYN LEVER, in her (former)[1] capacity as Registrar of Voters for the County of Orange, and SUZANNE SLUPSKY, in her capacity as Assistant Registrar of Voters for the County of Orange, ("Registrar Defendants") seek rehearing *en banc* of the November 23, 2005 Panel decision in this matter (Pregerson, J., Canby, J., and Reed, J.). As discussed more fully below, counsel asserts rehearing is necessary and appropriate for the following reasons:

- The majority Opinion presents an issue of national application and exceptional significance under the Voting Rights Act of 1965 (the "VRA"), 42 U.S.C. § 1973aa-1a(c) ("Section 203");
- The majority Opinion creates a clear split between the 9th Circuit and the 10th and 11th Circuits;
- The majority Opinion erroneously concludes that privately circulated recall petitions are voting materials provided by California elections officials to which the requirements of the VRA

[1] As a point of information, although Rosalyn Lever was the Registrar for the County of Orange at the time this action was initiated in the District Court, she is no longer the Registrar. Neal Kelley is currently Acting Registrar for the County of Orange.

apply; and

- The majority Opinion's interpretation and application of the California Elections Code fails to conform to California courts' interpretation of the powers and duties of elections officials.

In the judgment of counsel, rehearing *en banc* is required because the Opinion, despite its effort to distinguish contrary case authority from other circuits, creates a significant conflict with two decisions of other Circuit Courts of Appeal. *En banc* rehearing of this matter is thus justified by an overriding need for national uniformity on this subject. *See*, Ninth Circuit Local Rule 35-1.

The Panel's majority (Pregerson, J. and Reed, J.)[2] holds that the minority language requirements of Section 203 apply to recall petitions. Opinion at 15511 - 15512. Thus, the Opinion, if allowed to stand, would require all states within the Ninth Circuit – at least those whose elections officials review petitions in ways similar to the review in California – to enact new election procedures for recall petitions, and perhaps all petitions. Such procedures would mandate that petition circulators – in voting districts where the minority language requirements of Section 203 apply – prepare and circulate those petitions in the requisite minority languages for those

[2] A copy of the Opinion is attached hereto as Exhibit "A."

voting districts.

The majority's Opinion has already engendered significant uncertainty regarding its application to other petition, initiative and referendum processes. *See*, Exhibit B, a true and correct copy of a commentary by Richard L. Hasen in the Los Angeles Times, December 12, 2005. Additionally, the Opinion is being used by the targets of at least one pending recall election as a purported basis to call off an already scheduled special election. *See*, Exhibit B; s*ee* also, Exhibit C, a true and correct copy of an editorial in the Pasadena Star News regarding a pending recall election in the City of Rosemead.

On the other hand, in the Tenth and Eleventh Circuits, as announced by the decisions in *Montero v. Meyer*, 861 F.2d 603 (10th Cir. 1988) and *Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988), the clear rule is that the minority language requirements of Section 203 do not apply to petitions circulated by private parties because (among other grounds and reasons stated by those Courts) such petitions do not constitute election materials "provided by" the government, and because Congress did not intend the VRA to apply to the political activities of private citizens.

The Registrar Defendants contend that the *Delgado* and *Montero* decisions are sound, well-reasoned and consistent with the clear language and intent of the VRA and of Section 203. Conversely, the majority departs from and inappropriately expands the express provisions of the VRA by holding recall petitions must conform to the minority language requirements of Section 203 and by characterizing such petitions as election materials provided by the government.

Although the majority here attempts to distinguish *Montero* and *Delgado* factually (Opinion at 15509), it is readily apparent that the majority rejects the *Montero* and *Delgado* holdings not only due to perceived factual distinctions but also due to a fundamental disagreement with those Circuits' interpretation of the VRA's purpose. Thus, the majority concludes:

> The decisions of these [10th and 11th] circuit courts essentially exclude non-English speaking persons from knowledgeably deciding whether to qualify an initiative enshrining an English-only requirement into their state constitutions. Such a result cannot be what Congress intended when it defined the purpose of section 203 as one to remedy past language discrimination in voting practices so as to enforce the guarantees of the Fourteenth and Fifteenth Amendments to the Constitution and to ensure that citizens of language minorities are no longer effectively excluded from participation in the electoral process. See 42 U.S.C. § 1973aa-1a(a).

Opinion, at 15500-15501.

Such a clear disagreement among the Circuit Courts of Appeal in their interpretation of the VRA and of whether Section 203 applies to nongovernmental activities such as the circulation of petitions by private parties, justifies rehearing of this matter *en banc* because that split in authority presents an issue of exceptional significance within the meaning of Federal Rules of Appellate Procedure ("FRAP"), Rule 35(a). *See also,* Rule 35(b)(1)(B), and 1998 Advisory Committee Note to Rule 35(b). Furthermore, the conflict between this Opinion and decisions of other Circuits on an issue of such national importance is an express basis for *en banc* rehearing under Ninth Circuit Local Rule 35-1.

II.

PETITION FOR REHEARING EN BANC

A. *En Banc* Rehearing Of This Issue Is Vitally Important To Elections Officials and Petitioners Throughout The Country Because The Opinion Is At Odds With The Language Of Section 203 and With Decisions Of Two Other Circuit Courts of Appeal.

The plain language of Section 203 and the holdings of the only two prior Federal appellate decisions that have expressly interpreted it in this context call for rehearing of this matter. Further, in arriving at its conclusion, the majority ignores the definition of "vote," as provided in the VRA. By ignoring the definition of what a "vote" is, the majority contravenes the scope and intended application of the VRA as clearly

defined by Congress.

Section 203(c) of the VRA provides in pertinent part:

> Whenever **any state or political subdivision** subject to the prohibition of subsection (b) of this section **provides** any registration or **voting** notices, forms, instructions, assistance, or other **materials** or information **relating to the electoral process,** including ballots, it shall provide them in the language of the applicable minority group as well as in the English language....

42 U.S.C. §1973aa-la(c) (emphasis added). Thus, section 203's minority language requirement applies only if two conditions exist. First, the materials must be "provided" by the state or its political subdivision. Second, the materials must "relat[e] to the electoral process."

1. The Registrar Defendants Did Not "Provide" the Recall Petitions At Issue In This Case.

Under California law, the Registrar Defendants have, at most, only a ministerial, regulatory role in the petition process and are not involved in preparing, printing, copying or circulating petitions. California Elections Code Division 11 governs recall petitions and elections. The right to recall an elected officer is reserved to the registered voters of the jurisdiction of the official whose recall is sought. *See,* Cal. Const. Art. II, §13; Cal. Elec. Code §11005. As part of the recall process, the elections official, whether local or statewide, plays a role in assuring the fairness of the process by performing such ministerial duties as approving the proposed petition as complying with

the various format requirements of the Elections Code; verifying signatures; and certifying whether sufficient signatures have been obtained.

The role of California elections officials in reviewing such petitions is not markedly different than the role of elections officials in Colorado and Florida as described by the decisions in *Montero v. Meyer*, 861 F.2d 603 (10th Cir. 1988) and *Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988). Certainly any differences in the respective roles played by election officials in those states are not so significant in quality or quantity as to transform such petitions in California into election materials "provided by" the State, so as to trigger Section 203's minority language requirement.

In *Delgado v. Smith, supra*, the Eleventh Circuit addressed the applicability of section 203(c) to Florida's initiative process. The *Delgado* Court focused on the level of state activity in determining whether the petitions were "provided" and whether section 203(c) applied. The initiative proponents in *Delgado* sought to amend the Florida constitution to declare English as the official language of the state. In Florida, when there is an amendment proposed to the state constitution via the initiative process, the state's Attorney General ultimately must petition the Florida Supreme Court for an advisory opinion regarding the constitutionality of the proposed amendment. *Delgado*, 861 F.2d at 1491. The *Delgado* court concluded that

even this level of state action was not sufficient to merit application of the VRA's minority language requirements to the circulation stage of the petition process.

Delgado's analysis of this issue focused on two important factors. First, Florida elections officials have no involvement in circulating or bearing the costs of printing initiative petitions. *Delgado* at 1497, n. 7. Second, the Florida Constitution "expressly reserves to the people the right to amend the constitution by initiative." *Delgado* at 1496.

Both of those critical factors, which formed the basis for the *Delgado* Court's holding, are equally true in California's recall petition process. California officials do not "provide," i.e., circulate, the recall petitions to the voters, nor do they bear the costs of printing the petitions; and the California Constitution specifically reserves to the people the right to seek recall of an elected officer. *See*, Cal. Const. Art. II, §13; Cal. Elec. Code §11005.

2. A Recall Petition Does Not Constitute "Voting Material" Relating To The "Electoral Process."

As discussed above, the second of Section 203's conditions that must be met in order to trigger application of the minority language requirement is that the materials in question must relate to the "electoral process" itself. Moreover, the VRA's text and history show that it is intended to protect the right to vote. The Tenth Circuit directly addressed the purpose of the VRA

and the minority language requirement in *Montero v. Meyer*:

> The Act is not written so broadly to encompass all forms of petition. "The objective of the Act's provisions is to make the total registration and voting process in the language of the applicable language minority group comparable to the registration and voting process in English."

Montero, 861 F. 2d at 609.

> The term "vote" is defined by the VRA as including:
>
> all action necessary to make a vote effective in any primary, special, or general election, including but not limited to, registration, listing pursuant to this, or other action required by law prerequisite to voting, casting a ballot and having such a ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

42 U.S.C. §1973 1(c)(1).

From this definition of "vote," it necessarily follows that "voting materials" are materials relating to a "primary, special or general election, including, but not limited to, registration ... other action ... prerequisite to voting, casting a ballot or having such a ballot counted properly." *Montero*, at 609. Nowhere in Congress' definition of "vote", to which the VRA necessarily applies, is there even the implication that pre-election activities of private individuals such as circulating petitions, are voting activities that should be covered by the VRA. Certainly, the circulation of a petition, and even the signing of the petition is not a vote. The recall petition does not

decide who wins an election or even which candidates will be on the ballot for an election. Rather, the recall petition, if certified and validated by the elections official, merely causes an election to be held. "[...] [A]pplying the concept of voting to a process which provides no choice defies the commonly accepted usage of the term" vote. *Id.*

In *Montero*, the Tenth Circuit considered whether the VRA requires a petition for amendment of the Colorado State Constitution to be circulated in applicable minority languages. The *Montero* court held that the VRA does not require such petitions to be circulated in multiple languages. *Id.* at 605, *accord, Delgado* at 1489. The *Montero* court reasoned that the role of Colorado elections officials in overseeing and reviewing petitions served the purpose of ensuring the fairness of the petition process. Such action was, at most, regulatory and did not transform the petitions – i.e., the subject of the regulation and oversight – into state action:

> The acts performed by those [state] officers are designed primarily to make the initiative process fair and impartial and do not constitute providing the petitions to the electorate. At most, the acts of the state officers could be regarded as 'regulatory,' but state regulation is insufficient to convert private action into state action. [Citations omitted.]

Montero at 610.

Another basis for the holding in *Montero* was that "'the electoral process' to which the minority language provisions of the Act apply does not commence under Colorado law until the Secretary of State certifies the measure is qualified for placement upon the ballot, and that signing of an initiated petition is not 'voting.'" *Id.* at 607.

Contrary to the majority's attempt here to distinguish *Montero,* the same holds true in California. Under California law, the "electoral process" resulting from a recall petition's circulation does not begin until the petition is certified and the election is called as required by California Elections Code section 11240. *See* E.R. at 127, ¶ 10.

Assuming *arguendo* that certain signatories on the recall petition here at issue did not understand what they were signing due to their inability to read English, this had no impact whatsoever on their voting rights (to vote for or against the recall as they saw fit), since the ballots themselves and any other explanatory materials provided by the Registrar Defendants were provided in the minority languages required by Section 203.

As the District Court aptly noted below during oral argument of the Order to Show Cause regarding Preliminary Injunction, how is a "voting right" denied "if the election isn't held?" E.R. at 83, ll. 22-23. The District

Court expanded upon this in denying Appellants' Request for a Preliminary Injunction:

> The private recall petition process does not involve 'voting' because inherent in the concept of 'voting' is the exercise of a choice between two or more alternatives that has an effect on the outcome of an election. No voting or election occurs with the circulation of a recall petition.

E.R. at 127, ll. 13-17; *see also, Montero, supra,* at 607; *Delgado, supra*, at 1496-1497. By its opinion, the majority effectively converts private party action, to which the VRA should not apply, into state action so that the minority language requirements of Section 203 may attach.

3. The Majority's Interpretation of the California Elections Code and the Corresponding Powers of the Registrar Is Inconsistent With California Courts' Interpretation

The majority concludes that *Montero* and *Delgado* are distinguishable from the instant case, and therefore not to be followed. Opinion at 15499-500. The distinction drawn by the majority is that the "Orange County Elections Department's approval of the Recall Petition [is] more than 'merely ministerial.'" Opinion at 15500. The majority finds that because California Elections Code section 11042 allows an elections official to "ascertain if the proposed form and *wording* of the [recall] petition meets the requirements of this chapter," (italics in Opinion) the California elections officials have broader authority, exceeding the realm of ministerial, than do

the Colorado and Florida officials. *Id.* The distinction drawn by the majority is illusory at best and is contrary not only to California's statutory scheme relating to recall petitions but also California's decisional law interpreting a Registrar's authority in general.

a. The Statutes Relating to Recall Petitions, When Examined as a Whole, Contradict the Conclusion of the Majority.

In concluding that California elections officials have broader authority when approving recall petitions than the elections officials in *Montero* and *Delgado* had when approving initiative petitions, the majority places emphasis on the term "wording" as contained in Elections Code section 11042(a). Opinion at 15500. The majority's focus on a single word in the statutes pertaining to recall elections results in too narrow an interpretation of the California Elections Code. It is a cardinal rule of statutory construction that a statute is to be read as a whole. *Washington State Dept. of Soc. & Health Svcs. v. Guardianship Estate*, 537 U.S. 371, 385 (2003). The majority ignores the statutory context within which Section 11042 must, by its plain language, be considered.

Section 11042 is part of Division 11, Recall Elections, Chapter 1, General Procedures, of the Elections Code. Section 11042 grants authority to elections official to "ascertain if the proposed form and wording of the

petition *meets the requirements of this chapter.*" (Emphasis added.) The requirements of the chapter with which the "form and wording" must comply, however, do not include any requirement that petitions be bilingual (or otherwise readily understood by all who read the petitions), and give no authority to elections officials to change, comment upon or otherwise affect wording of the petition in a substantive manner. Rather, the requirements of that chapter are procedural requirements designed to ensure that the recall process is fair and equitable. Thus, elections officials must confirm that a proposed petition for recall contains the following elements/wording:

- "A request that an election be called to elect a successor to the officer." Elec. Code §11041(a)(1).
- "A copy of the notice of intention, including the statement of grounds for recall" with names of at least 10 recall proponents that appear on the notice of intention. Elec. Code §11041(a)(2).
- "The answer of the officer sought to be recalled, if any." Cal. Elec. Code §11041(a)(3).

The "wording" that an elections official is granted authority to review, is the wording designated by the chapter. An election official may reject a proposed recall petition if the proponents fail to include the wording "notice of intention to recall" (§11041(a)(2)) or "request that an election be called to

elect a successor" (§11041(a)(1)). No authority is granted to elections officials to change the substance of the grounds for the recall contained in the notice of intention or the answer of the target of the recall, which are the only substantive aspects of a recall petition.

Consequently, if examined in its context, the term "wording" in Section 11042 does not pertain to the *substance*, complexity or even understandability of the wording in a petition to recall but rather assures certain required words and statements are present in compliance with the procedural requirements of Division 11. The majority's reliance on this single word, taken out of context, draws a distinction without a difference between California laws and the laws analyzed in *Montero* and *Delgado*.

b. The Majority's Opinion Ignores California Precedent Regarding the Ministerial Nature of an Elections Official's Authority.

As a general rule, when federal courts interpret or apply state laws, federal courts should defer to state decisional law. See, generally, *Erie Railroad Co., v. Tompkins*, 304 U.S. 64 (1938); *Tenneco West, Inc. v. Marathon Oil Co.*, 756 F.2d 769, 771 (9th Cir. 1985). Although this case involves a federal question – the VRA – it is the majority's interpretation and application of state law that leads to a result that is in direct conflict with the result in two other federal circuits. To the extent that the Majority's

interpretation and application of Election Code section 11042 grants significant discretionary authority to California elections officials it ignores California decisional law holding elections officials' duties are merely ministerial.

California courts have historically and consistently held elections officials' duties are ministerial and procedural in nature. An elections official's "duty is limited to the ministerial function of ascertaining whether the procedural requirements for submitting an initiative measure have been met." *Farley v. Healey*, 67 Cal. 2d 325, 327. *See also*, *Alliance for a Better Downtown Millbrae v. Wade*, 108 Cal. App. 4th 123, 132 (2003) ("[L]ocal elections officials have a ministerial duty to reject initiative petitions that violate one or more statutory procedural requirements."); *Myers v. Patterson*, 196 Cal. App. 3d 130, 135 (1987) (ministerial duty of registrar of voters not exceeded when he rejected a petition submitted without notice of intention and statement as required by statute).

California courts have also held that when accepting or rejecting petitions, an elections official is performing a ministerial function involving no exercise of discretion. *Billig v. Voges*, 223 Cal. App. 3d 962, 969 (1990). To conclude otherwise would imply elections officials have a discretionary fact finding function, judicial in nature, when examining submitted petitions,

which is not the case. *Ley v. Dominguez*, 212 Cal. 587, 602 (1931). Collectively, California cases recognize that the Elections Code,

> only authorize[s] local elections officials to review a petition as submitted for compliance with *procedural requirements*, absent an express grant of broader powers. [The code] foreclose[s] elections official decisions that are discretionary or go beyond a straightforward comparison of the submitted petition with the statutory requirements of the petition.

Alliance for a Better Downtown Millbrae, 108 Cal.App.4th at 133 (emphasis added).

The majority's interpretation and application of Elections Code section 11042 implies elections officials in California have far more discretionary authority than either the statutory or case law actually provide. The majority's interpretation of the elections officials' authority to affect the "wording" of recall petitions in some substantive rather than procedural fashion contravenes state court interpretation of the state's laws, which is not allowed.

4. The Majority's Reliance on Dicta In *Zaldivar* Is Misplaced.

In its' Opinion, the majority appears to accept Appellants' urging to rely on a footnote contained in a 1986 Ninth Circuit case, *Zaldivar v. City of Los Angeles*, 780 F. 2d 823 (9th Cir. 1986), *overruled on other grounds, Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990), and to treat it as

dispositive of this appeal. But the holding in *Zaldivar* is inapposite and the footnote in question is dicta. The majority's reliance on *Zaldivar* when there are two cases from other circuits directly on point is inappropriate.

The *Zaldivar* Court states at various points in the decision that the only issue considered by it on that appeal was the issue of the propriety of Rule 11 sanctions that had been ordered by the district court. "[A]s we view the present posture of this case, the only relevance of the voting rights issue is its bearing on the imposition of sanctions." *Zaldivar,* 780 F.2d at 828, 832-834. When the *Zaldivar* Court addressed the Rule 11 sanctions issue, it framed the issue very narrowly: "[W]e are concerned only with whether the complaint asserts a good faith argument for applying the VRA under these circumstances, **even if that legal argument may ultimately fail.**" *Zaldivar* at 832 (emphasis added). Accordingly, the *Zaldivar* discussion of the VRA in footnote 11 is nothing more than dicta and certainly does not constitute binding precedent under principles of *stare decisis*.

5. The Inter-Circuit Conflict Created By the Majority Opinion, Coupled With The National Significance Of This Issue, Requires Rehearing *En Banc* In Order To Achieve Uniformity.

A review of the majority's Opinion, on the one hand, and a review of the *Montero* and *Delgado* decisions, on the other, leads to the inescapable conclusion that they are in conflict with each other. Moreover, it cannot be

denied that the majority's Opinion, if allowed to stand, would have widespread implications and impact not only within the states in the Ninth Circuit, but nationwide. The question of whether or not the states located in the Ninth Circuit – and perhaps any others whose petition review procedures are similar to California's – are now required to implement minority language petition requirements in those voting districts where Section 203's requirements would otherwise apply is an issue of exceptional importance, not only to elections officials but to those who circulate such petitions.

Thus, under FRAP Rule 35(a), this proceeding involves "a question of exceptional importance" which requires rehearing *en banc*. Beyond that, in light of the clear conflict of authority between this Opinion and the Tenth and Eleventh Circuits on this issue, rehearing *en banc* is called for under Ninth Circuit Local Rule 35-1:

> When the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such conflict is an appropriate ground for suggesting a rehearing en banc.

III.

CONCLUSION

Based on the foregoing, the Registrar Defendants respectfully request *en banc* rehearing of this appeal, for the reasons set forth in the statement of counsel, above.

DATED: December 13, 2005

Respectfully submitted,

BENJAMIN P. de MAYO,
COUNTY COUNSEL
and WENDY J. PHILLIPS, DEPUTY

By _____
Wendy J. Phillips, Deputy

Attorney for Defendants-Appellees,
Rosalyn Lever and Suzanne Slupsky

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 40-1(a) I certify that this **DEFENDANTS-APPELLEES' PETITION FOR REHEARING EN BANC** is proportionally spaced, has a typeface of 14 points or more and contains 4155 words.

DATED: December 13, 2005

_____
Wendy J. Phillips, Deputy

Attorney for Defendants-Appellees,
Rosalyn Lever and Suzanne Slupsky

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PLAINTIFFS-APPELLANTS' RESPONSE TO PETITION FOR REHEARING EN BANC

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STATUTES, RULES AND REGULATIONS

I. Introduction

Defendants-Appellees Rosalyn Lever and Suzanne Slupsky have filed a Petition for Rehearing En Banc of the Panel's decision filed on November 23, 2005. *Padilla, et al., v. Lever*, No. 03-56259 (cited as Slip Opinion). The Panel's decision held that "section 203 of the Voting Rights Act [42 U.S.C. § 1973aa-1a(c)] applies to recall petitions circulated pursuant to California law." Slip Opinion, at 15512. This Court requested the Plaintiffs-Appellants to file a response to the Petition in an Order filed on December 19, 2005. Pursuant to this Order, the Plaintiffs-Appellants are filing this Response in opposition to the Petition seeking a rehearing en banc. Plaintiffs-Appellants contend that the Defendants-Appellees have not met the standards required by Federal Rule of Appellate Procedure ("Fed. R. App. P.") 35(a)(2) and Ninth Circuit Rule 35-1 for ordering a rehearing en banc.

II. The Panel's Interpretation of the Bilingual Election Provisions of the Voting Rights Act Does Not Implicate the Standards for Ordering a Rehearing En Banc.

In their Petition, the county voter registration officials contend that a rehearing en banc is warranted for the following reasons: (1) the Panel's decision "presents an issue of national application and exceptional significance under the Voting Rights Act of 1965 . . .", Petition for Rehearing En Banc (filed December 14, 2005), at 1 (hereinafter cited as Petition); (2) the Panel's decision creates a

conflict between the Ninth Circuit Court of Appeals and the Tenth and Eleventh Circuit Court of Appeals; (3) the Panel's decision erroneously concludes that the statutory language of the Voting Rights Act encompasses privately circulated recall petitions; and (4) the Panel's decision is inconsistent with state precedent specifying "the powers and duties of election officials." Petition, at 1. As presented to the Court for consideration, these arguments are insufficient to justify invoking the extraordinary proceeding of a rehearing en banc.

Fed. R. App. Pro. 35 lists the criteria for ordering a rehearing en banc. Rule 35 specifies that maintaining uniformity of the Circuit Court's decisions is one factor that may warrant a rehearing en banc. Fed. R. App. Pro. 35(a)(1). In addition, if the case involves a "question of exceptional importance" a rehearing en banc may also be justified. Fed. R. App. Pro. 35(a)(2). An example of a case involving a "question of exceptional importance" occurs when the case "involves an issue in which the Panel's decision conflicts with the authoritative decisions of other United States Courts of the Appeals that have addressed the issue." Fed. R. App. Pro. 35(b)(1)(B). Furthermore, an applicable Circuit Court rule also refers to a conflict in the Circuit Courts involving a rule of national application "in which there is an overriding need for national uniformity . . ." as an appropriate consideration for suggesting a rehearing en banc. Ninth Circuit Rule 35-1.

The Petition does not present a claim regarding any intra-Circuit Court conflict. Accordingly, the Petition's request can only be granted if the case presents a question of exceptional importance or if the Panel's decision creates an inter-Circuit Court conflict involving a rule of national application where there is an overriding need for national uniformity. As to these remaining reasons, the Petition fails to provide a basis for ordering the extraordinary proceeding of a rehearing en banc.

A. The Petition Does Not Raise Any Questions of Exceptional Importance.

Arguably any case involving a federal statute would implicate concerns regarding a consistent national application. However, not every interpretation should rise to the level of "exceptional importance." In the case at bar, the Panel concluded that section 203 of the Voting Rights Act of 1965, 42 U.S.C. § 1973aa-1a applies to recall petitions circulated in accordance with California election laws. Slip Opinion, at 15512. The Panel's decision consisted of interpreting a provision of the Voting Rights Act so that the application of section 203 would be consistent with the intent of Congress and statutory framework of the Voting Rights Act, Slip Opinion, at 15501-15504, the precedents of the United States Supreme Court, Slip Opinion, at 15506-15507, and, most importantly, consistent with the interpretation

expressed by the United States Attorney General in its regulations governing the scope of section 203, Slip Opinion at 15504.

In summary, the Panel's decision interpreted an express provision of the Voting Rights Act to require the application of a bilingual election process to recall petitions. The Panel's decision involved a straightforward statutory analysis that was supported by Supreme Court precedent and regulations promulgated by the United States Attorney General. This statutory analysis resulted in the inclusion of an electoral process that was already specified by statute and applicable regulations. This electoral process consisted of the preparation and circulation of recall petitions that would trigger whether an election would be held. The statute's reference to "other materials or information relating to the electoral process," 42 U.S.C. § 1973aa-1a(c), and the United States Attorney General regulatory language that defined "written materials" as including voter petitions supported the Panel's conclusion that section 203 encompassed recall petitions.[1] Accordingly, the Panel's decision, although involving an interpretation of a statute of national application, does not involve a question of exceptional importance warranting the

[1] Had this case involved an interpretation of a statute that did not explicitly provide for a bilingual election process and did not include a reference to petitions in the regulations interpreting the statute, the Petition's argument regarding the presentation of a question of exceptional importance would be more compelling.

extraordinary proceeding of a rehearing en banc.

Even if the question presented was one of exceptional importance, a rehearing en banc is not mandatory. As stated by this Court: "To rehear a case en banc *simply* on the basis that it involves an important issue would undermine the three-judge panel system and create an impractical and crushing burden on what otherwise should be, as [Fed. R. App. Pro.] Rule 35(a) suggests, an exceptional occurrence." *Newdow v. U.S. Congress*, 328 F.3d 466, 469-70 (9th Cir. 2003) (Cir.J. Reinhardt concurring).

In conclusion, the Petition does not present a question of exceptional importance. And, even if it did, not all cases involving questions of exceptional importance should be reviewed en banc. For these reasons the Court should deny the Petition.

B. The Panel's Decision Does not Create a Conflict Among Circuit Court of Appeals.

The second basis for supporting a rehearing en banc is the presence of a conflict between the Panel's decision and the decision of another Circuit Court related to an issue of national importance and application. Plaintiffs-Appellants argue that such a conflict is not present and, thus, the Petition requesting an order to convene a rehearing en banc should be denied.

The Petition argues that the Panel's decision created a conflict between the Court of Appeals for the Ninth, Tenth, and Eleventh Circuits. The Tenth Circuit case involved an initiative petition seeking to amend the Colorado Constitution to designate English as the state's official language. *Montero v. Meyer*, 861 F.2d 603 (10th Cir. 1988). The Tenth Circuit Court concluded that the signing of petitions did not constitute voting and the petitions were not "provided" by the states and thus did not trigger the application of the bilingual election requirements of section 203. The Eleventh Circuit case involved a similar effort to amend Florida's constitution to designate English as the state's official language. *Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988).

However, the Panel concluded that both *Montero* and *Delgado* were distinguishable.[2] The Panel focused on the degree of state involvement in determining whether the state "provided" the materials in question. The Panel concluded that "[n]either Florida's nor Colorado's statutory and regulatory scheme

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[2] The legal analysis in determining whether inter-Circuit Court conflicts exists is similar to the analysis used in assessing whether there is an intra-Circuit Court conflict. *See, e.g., U.S. v. Hardesty*, 977 F.2d 1347 (9th Cir. 1992) (the specific issue in conflict in previous panel decisions within the Ninth Circuit Court of Appeals related to the authority of a District Court to impose a sentence in a federal criminal matter to run consecutively with an ongoing sentence in a state criminal matter). An inter-Circuit Court conflict analysis also focuses on the particular issue and the factual underpinnings present in the different Circuit Court cases.

governing initiative petitions are structurally equivalent to California's scheme." Slip Opinion, at 15500. In Florida and Colorado, there is no statutory or regulatory provision for reviewing a petition's content as there in California. As the Panel noted, in California election officials are required to authorize and approve "the form and content of the recall petition." *Id.* Moreover, election officials in Colorado can only suggest changes as to the format and content of the initiative petition. In contrast, California specifies that election officials will have the final determination of whether a recall petition complies with applicable statutory requirements: "Unlike Colorado, California recall proponents are statutorily required to alter their recall petition as directed by election officials until elections officials are satisfied that no further alterations are required." *Id.*

These different statutory frameworks are relevant in assessing whether there is the requisite degree of state involvement to support a conclusion that the state "provides" election materials. In states such as Colorado and Florida where the election officials cannot require any changes to the content of the petition to be circulated, the degree of state involvement and control is substantially less than California's statutory scheme. If election officials in Florida and Colorado do not have the ultimate determination to require changes to the content of a petition, then for all practical purposes, the states are not providing any election materials and

instead are performing ministerial duties in the conduct of elections.

This focus on comparing the statutory framework of Colorado, Florida, and California, accentuates the differences that persons seeking to circulate petitions must take into consideration when preparing and presenting their petitions to election officials. Plaintiffs-Appellants contend that these differences are dispositive of the question of whether a conflict among Circuit Courts exists. As a result of these differences, the Panel determined that California "provides" election materials and that Colorado and Florida do not.

The importance of this distinction is supported by the Petition. The Petition states the following:

> The Panel's majority (Pregerson, J. and Reed, J) holds that the minority language requirements of Section 203 apply to recall petitions. Opinion at 15511-15512. Thus, the Opinion, if allowed to stand, would require all states within the Ninth Circuit - *at least those whose elections officials review petitions in ways similar to the review in California* - to enact new elections procedures for recall petitions, and perhaps all petitions.

Petition, at 2 (emphasis added). The Petitioners acknowledge that other states encompassed by the Ninth Circuit Court of Appeals may not have the same statutory scheme as California in the regulation of voter initiated petitions. Furthermore the Petitioners suggest that if election officials in those other states do

not review petitions "in ways similar to the review in California" then the Panel's interpretation of section 203 could not be extended to those states.

The Petitioners' statement has equal applicability to the statutory framework of both Colorado and Florida. As noted in the Panel's decision, the review of petitions in Florida and Colorado is not similar to the procedures established in California. Thus, under the Panel's statutory analysis and consistent with Petitioner's statement, the holding of the Court could not be extended to these states. If the holding of the Panel's decision cannot be extended to Florida and Colorado, then the *Montero* and *Delgado* decisions are distinguishable.

Since the cases are distinguishable there is no conflict between the Panel's decision and the cases decided in the Tenth Circuit and Eleventh Circuit Court of Appeals. The absence of such a conflict does not comply with the requirements of Fed. R. App. Pro. 35(a)(2) & (b)(1)(B) and Ninth Circuit Rule 35-1. For these reasons, the Petition requesting a rehearing en banc should be denied.[3]

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[3]The Petition listed four reasons in support of the request for a rehearing en banc. Petition, at 1-2. The first reason and second reasons have been addressed. An analysis of the third reason regarding the scope of the Voting Rights Act was incorporated in the discussion relating to the first and second reasons. The fourth reason defining the election officials' powers and duties is not discussed. The fourth reason does not rise to the level of a question of exceptional importance and does not implicate the requirement of a conflict among Circuit Court decisions.

Conclusion

The Petition seeks review of the Panel's decision by the full Court. However, as demonstrated in this Response, the Petition does not meet the stringent requirements of Fed. R. App. Pro. 35 and Ninth Circuit Rule 35-1. There is no question of exceptional importance and there is no conflict among Circuit Court decisions. Accordingly, the appropriate route for review of a decision which the Petitioners are not in agreement with is by way of a writ of certiorari and review by the United States Supreme Court, not by invoking this Court's extraordinary procedure of a rehearing en banc. For these reasons, the Petition should be denied.

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Dated: January 17, 2006 Respectfully Submitted

By: _____
Joaquin G. Avila
Attorney for Plaintiffs-Appellants'

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 35-4 and/or 40-1, the attached petition for rehearing en banc answer is:

____ Proportionately spaced, has a typeface of 14 points or more and contains _____ words.

or

____ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text.

or

X In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

1.17.06
Date

Joaquin G. Avila
Signature of Attorney

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 634 South Spring Street, 11th Floor, Los Angeles, CA 90014.

On January 17, 2006, I served **PLAINTIFFS-APPELLANTS' RESPONSE TO PETITION FOR REHEARING EN BANC** on the parties identified below by placing a true and correct copy thereof enclosed in a sealed envelope(s) for collection at my place of business, following ordinary business practices addressed as follows:

Attorneys for Defendants-Appellees, Rosalyn Lever and Suzanne Slupsky Benjamin P. de Mayo, County Counsel Edward N. Duran Wendy J. Phillips County of Orange 10 Civic Center Plaza, Room 407 P.O. Box 1379 Santa Ana, CA 92701 **FAX NO: (714) 834-2359**	**Attorney for Defendant, Vivian Martinez** Frederic D. Woocher STRUMWASSER & WOOCHER LLP 100 Wilshire Blvd., Suite 1900 Santa Monica, CA 90401 **FAX NO: (310) 319-0156**
Attorney for Amicus Curiae, Santa Ana Unified School District George William Shaeffer, Jr. Breon & Shaeffer 19800 MacArthur Blvd., #1070 Irvine, CA 92612 **FAX NO: (949) 260-0901**	Clerk for Judge Alicemarie H. Stotler United States District Court Central District of California 411 West Fourth Street, Room 1053 Santa Ana, CA. 92702-1994 **VIA OVERNIGHT MAIL**

[X] **BY MAIL** - I deposited such envelope in the mail at Los Angeles, California, with first class postage thereon fully prepaid. I am readily familiar with the business practice for collection and processing of correspondence for mailing. Under that practice, it is deposited with the United States Postal Service on that same day, at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one (1) day after the date of deposit for mailing in affidavit.

[X] **BY FAX** - I caused the foregoing document to be served by facsimile transmission to each interested party at the facsimile machine telephone number shown on the attached service list.

I certify or declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

1-17-06
Date

Gabriel Sanchez